

Vol 3

DEC 6 1940

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, A. D. 1940.

No. 612

MISSOURI PACIFIC TRANSPORTATION COMPANY,

and

COMMERCIAL CASUALTY INSURANCE COMPANY OF NEWARK,  
NEW JERSEY, INTERVENOR, *Petitioners*,

v.

J. C. GEORGE, J. H. LOOKADOO and G. W. LOOKADOO,  
*Respondents*.

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT AND BRIEF IN SUP-  
PORT THEREOF.**

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Company and Commercial  
Casualty Insurance Company  
of Newark, New Jersey.*

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT.**

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To the Honorable, the Chief Justice and Associate Justices  
of the Supreme Court of the United States:

Petitioner seeks to have reviewed here a decision of the  
United States Circuit Court of Appeals for the Eighth Cir-  
cuit. The opinion of the Circuit Court of Appeals is re-  
ported in 114 Fed. (2d) 757, and is printed in the appendix  
to this petition at page 52.

**SYNOPSIS OF POINT INVOLVED.**

Judgment entered against petitioner, Missouri Pacific Transportation Company, in the Circuit Court of Clark County, Arkansas, in a suit by respondent, J. C. George, for personal injuries, was affirmed by the Supreme Court of Arkansas, and became final. Petitioners (defendant in the state court and the surety upon its supersedeas bond) sought through a collateral attack on the judgment in the United States District Court for the Eastern District of Arkansas, to recover of respondents (plaintiff in the state court and his counsel) damages in the amount of the state court judgment plus interest and costs, praying in addition to the money judgment injunctive relief to prevent respondents from realizing upon their judgment in the State Court. The basis of petitioner's Federal suit was newly discovered evidence of conspiracy and fraud in faking the injuries complained of and in prosecuting the false claim to judgment.

Petitioners were denied a trial by jury in the District Court, and such denial affirmed by the Circuit Court of Appeals. Petitioners seek this review upon the ground that denial of trial by jury of its suit in the District Court infringed its rights under the Seventh Amendment to the Constitution.

**REFERENCES TO PROCEEDINGS BELOW.**

The original tort action was begun in the Circuit Court of Clark County, Arkansas, and judgment there was affirmed on appeal by the Supreme Court of Arkansas (133 S. W. (2d) 27, 198 Ark. 1110). A motion for new trial was filed, on ground of newly discovered evidence, which motion was denied by the trial court and such denial affirmed. (140 S. W. (2d) 680)

The action wherein respondents' constitutional rights are alleged to have been infringed was begun in the United States District Court for the Eastern District of Arkansas (jurisdiction there being by virtue of diversity of citizen-

ship). A plea of *res adjudicata* was sustained without hearing testimony, and upon appeal the cause reversed and remanded by the Circuit Court of Appeals. (R. 38)

After the case was remanded, leave of Court having first been obtained, on July 15, 1940 plaintiffs filed a second amended complaint, setting up new matter. (R. 43) Answer of defendants to this amended complaint was filed July 16, 1940. (R. 25) Demand for a jury trial was first filed July 11, 1940, but then only in behalf of Missouri Pacific Transportation Company. (R. 52) On July 15, 1940, the day the amended complaint was filed, plaintiff and intervenor joined in a written motion for jury trial (R. 53), and such motion was orally renewed at the hearing. (R. 78) No point was ever made in the District Court that the requests for jury trial were not properly and timely made and served. Upon hearing a finding was had against petitioners on the merits of the case (R. 59, 62(15), 63) and the action of the District Court affirmed by the Circuit Court of Appeals. (R. 641) The opinion of the Circuit Court of Appeals is reported at 114 F. (2d) 757, and is printed in the appendix hereto at page 52.

#### **SHORT STATEMENT OF THE FACTS.**

J. C. George sued Missouri Pacific Transportation Company and the driver of one of its motor busses in the Circuit Court of Clark County, Arkansas, for damages in the sum of \$50,000 for alleged personal injuries growing out of a purported bus accident in the city of Gurden, Clark County, Arkansas. Suit was tried by a jury, resulting in a verdict for \$15,000 with interest and costs. Appeal was taken to the Supreme Court of the State of Arkansas and the judgment affirmed. A motion and amended motion for new trial, filed on the grounds of newly discovered evidence, was overruled, and an appeal taken to the Supreme Court of Arkansas, which affirmed the action of the trial court. (140 S. W. (2d) 680)

In the appeal that was taken from the state court decision by the Missouri Pacific Transportation Company, its

co-petitioner here, Commercial Casualty Insurance Company, executed a bond as surety. J. C. George, plaintiff in the state court case, in whose favor the judgment was rendered, was represented by his co-respondents here, attorneys J. H. Lookadoo and G. W. Lookadoo.

The District Court suit was filed as a collateral attack upon the judgment obtained by J. C. George in the state court.

By virtue of Rule 18 of the Rules of Civil Procedure both legal and equitable relief was prayed: damages for \$15,000.00, the amount of the state court judgment, and injunctive relief against levying execution.

Petitioners' case in the District Court was founded on allegations of conspiracy and fraud on the part of defendant George and his attorneys, Messrs. Lookadoo, in preventing witness Claude Denson through coercion and duress from testifying truthfully on a motion for new trial. After trial in the state court defendants learned for the first time that plaintiff George had deliberately planned to fake and simulate an injury in order to mulct damages from the Missouri Pacific Transportation Company. They obtained an affidavit to that effect, but George and his attorneys got hold of Denson and by threats to bring about the imprisonment of himself and his father, caused him to retract his affidavit and to commit perjury. (R. 80, *et seq.*) The complaint also alleged that fraud was perpetrated through the promise of payment of \$500.00 to one John Smith, the only witness who testified that he saw the accident, and that said John Smith was in fact at home in bed at the time the accident allegedly took place. This information regarding witness Smith was first obtained by petitioners after the original complaint had been filed in the District Court, and hence was set out for the first time in the second amended complaint, filed July 15, 1940. (R. 43, 49)

Upon filing of suit in the District Court, an order to show cause was issued to prevent execution under the state court judgment. Respondents answered and among other things



urged the plea of res judicata which plea was by the trial court sustained. (Order of June 21, 1940, R. 29 *et seq.*) Objections were urged to the findings of fact and conclusions of law, for no testimony had been heard upon which any finding or conclusion could be predicated. Missouri Pacific Transportation Company made application to the court for stay pending appeal to the United States Circuit Court of Appeals. The application was refused and appeal perfected to the United States Circuit Court with an application that it retain the status quo and prevent the subject matter of the suit from being moot pending determination of the appeal. Upon consideration of the application, the United States Circuit Court of Appeals suggested that reversal would probably follow because of the court's failure to take testimony, whereupon respondents moved that the suit be immediately reversed and remanded to the District Court. By agreement of the parties an order was entered July 5, 1940, reversing and remanding the cause. (R. 38) Execution had also issued against Commercial Casualty Insurance Company of Newark, New Jersey, and the restraining order extended to said insurance company for the protection of petitioners herein until the cause could be heard upon its merits by the District Court. Mandate issued in response to the order of the court dated July 5, 1940. (R. 38) The case was immediately set for hearing July 16, 1940, *whereupon demand was made July 11, 1940, for trial by jury.* (R. 52, 53)

On July 15, 1940, the parties appeared before the District Court, whereupon respondent, Commercial Casualty Insurance Company was granted leave to intervene, and Missouri Pacific Transportation Company was granted permission to file its second amended bill of complaint. (R. 43) At the conclusion of the July 15th hearing, petitioners renewed, served and filed their application for trial by jury, which was by the court refused "*pending further consideration and decision of the equitable issues involved in said action.*" (R. 53, 54 (4 & 6)) On July 16, 1940, the

parties again appeared before the District Court, whereupon respondents renewed and urged their plea of res judicata. The court after hearing testimony in support of said plea announced that he would hear testimony upon the merits of the case; *whereupon, appellants renewed their application for trial by jury and were again refused.* (R. 78) The District Court having heard testimony of the parties and considered their request for findings of fact and conclusions of law, on July 17, 1940, sustained the plea of res judicata and entered its order dismissing the bill for want of equity and merit. (R. 59-63) A second application was made to the United States Circuit Court of Appeals upon presentation of a skeleton record disclosing that an appeal had been taken for injunctive relief pending the determination of the appeal, which application was granted and bond filed July 22, 1940. (R. 626)

The United States Circuit Court of Appeals rendered its opinion affirming the decision of the United States District Court for the Eastern District of Arkansas on the 1st day of October, 1940.

Applicants filed their petition for rehearing within fifteen days of the date of rendition of said opinion and the United States Circuit Court of Appeals for the Eighth Circuit entered its order overruling applicant's petition for rehearing on the 21st day of October, 1940. (R. 656)

#### **POINTS RELIED UPON FOR ALLOWANCE OF WRIT.**

##### **I.**

The suit in the District Court contemplated two forms of relief, cognizable in the same complaint only by virtue of the new Federal Rules of Civil Procedure: (first) a money judgment for the damages suffered as a result of the conspiracy and fraud, and (secondly) injunctive relief against collection of the judgment in the state court to the end that the District Court judgment, if in favor of petitioners, might not be moot.

Since trial by jury obviously would have been petitioners' constitutional right in a separate suit filed for damages prior to the effective date of the new rules, petitioners cannot be deprived of that right merely because, pursuant to new rules of court, adopted to simplify federal practice, they asked for both forms of relief in the same complaint.

## II.

Rule 18 of the Rules of Civil Procedure permitting joinder of claims and remedies should not be construed—inconsistently with Rule 30 which preserves the right to trial by jury as declared by the Seventh Amendment—so as to deprive litigants who have joined legal and equitable actions thereunder of their constitutional right to trial by jury which would otherwise exist.

## III.

Denial of a trial by jury of its action in the District Court was violative of the Seventh Amendment to the Constitution of the United States. The complaint alleged that judgment in the state court resulted from conspiracy and fraud and the action was brought for relief against the judgment so obtained. Because the issue of fraud in obtaining the judgment was one dependent upon evidence extrinsic of the judgment itself, it presented an issue triable as a matter of right under the Seventh Amendment to the Constitution.

Wherefore, your petitioners respectfully pray that a writ of certiorari be sued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and proceedings in cause No. 11,792, Missouri Pacific Transportation Company, plaintiff, and Commercial Casualty Insurance Company of Newark, New Jersey, intervener, v. J. C. George, J. H. Lookadoo

and G. W. Lookadoo, and that the judgment of the United States District Court for the Eastern District of Arkansas, Little Rock Division, and the judgment affirming the same of the United States Circuit Court of Appeals for the Eighth Circuit, be reversed and that your petitioners may have such other and further relief in the premises as this Honorable Court may deem proper.

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